Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In re Applications of	)	MM Docket No. 94-20
	)	
FAMILY BROADCASTING, INC.	)	File No. BPH-910924MB
	)	
For Construction Permit for a New FM Station on Channel 229A Hague, New York	)	

To: The Review Board

MASS MEDIA BUREAU'S
REPLY TO EXCEPTIONS

Respectfully submitted,
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MASS MEDIA BUREAU'S REPLY TO EXCEPTIONS

Preliminary Statement

The Mass Media Bureau, pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby replies to the exceptions of Family Broadcasting, Inc. (Family) filed April 20, 1995, to the Initial Decision of Administrative Law Judge John M. Frysiak, FCC 95D-3, released March 21, 1995 ("Initial Decision").

Counterstatement of the Case

1. By Hearing Designation Order, 9 FCC Rcd 1564 (1994), the Commission, by the Chief, Audio Services Division, designated the above-captioned application of Family Broadcasting, Inc. (Family) for hearing on the following issues:

> (a) whether the applicant at the time it so certified had reasonable assurance that its proposed site would be available to it;
>
> (b) whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant misrepresented to the Commission the availability of its specified site; and
>
> (c) if issue 1(b) above is resolved in the affirmative, the effect thereof on the applicant's qualifications to be a Commission licensee.

2. On November 1, 1994, Family filed a petition for leave to amend its application to specify a new antenna site. Because the necessary good cause showing for a petition for leave to amend was contingent upon the resolution of the above specified issues, the Presiding Judge dealt with the Family's petition in

his Initial Decision.

3. In his Initial Decision, the Presiding Judge concluded that, although Family never had reasonable assurance of the availability of its proposed antenna site, Family did not intend to deceive the Commission when it certified that its site was available. The Presiding Judge further concluded that because Family did not have the requisite reasonable assurance to begin with, it could not now be permitted to amend its application to specify a new site.

Questions of Law

1. **Whether the Presiding Judge's reliance on a rejected exhibit is reversible error where the ultimate conclusion reached is fully supportable by record evidence?**

2. **Whether an applicant can rely on an ambiguous response from the agent of a site owner as reasonable assurance that the site will be available?**

3. **Whether the Presiding Judge erred in determining that, in light of the fact that Family did not have reasonable assurance of the availability of the transmitter site specified in its application, it could not amend to specify a new site?**

Argument

The Presiding Judge's reliance on a rejected exhibit is of no decisional significance where his ultimate conclusion is fully supported by evidence of record.

4. Family protests the Presiding Judge's reliance on the declaration of Nicholas Westbrook, Mass Media Bureau Exhibit 1 (rejected at Tr. 85), to contradict the testimony of Peter Morton concerning whether Alex McEwing had received reasonable assurance

from Westbrook of the transmitter site specified in Family's application. In its application, Family proposed to locate its antenna on a tower located on Mt. Defiance. The tower site is owned by the Fort Ticonderoga Association. Westbrook manages the Mt. Defiance and other antenna sites for the Association. The testimony of Morton relates to conversations he claims to have had with Westbrook when Morton was the general manager of a local radio station and sought to obtain reasonable assurance from Westbrook of the availability of the Mt Defiance site for an application he was considering filing. Morton claims that Westbrook twice gave him "reasonable assurance" that the Mt. Defiance site would be available.

5. Morton's testimony is irrelevant to a determination of the issues in this proceeding. Morton was not privy to the conversation between Westbrook and McEwing during which Family claims Westbrook gave McEwing permission for Family to specify the Mt. Defiance site. Morton's testimony goes to conversations he claims to have had with Westbrook concerning a different proposal. What Westbrook may have told or said to Morton is totally irrelevant to a determination of whether Westbrook gave McEwing reasonable assurance when he spoke with him. This being the case, the fact that the Judge considered Morton's testimony and then disregarded it because of information contained in a rejected exhibit, is irrelevant and does not affect the outcome

of this case.[1]

An ambiguous response to a request for reasonable assurance of site availability does not constitute reasonable assurance.

6. Family contends that the Initial Decision erred in reciting the order of discussion of matters during the Westbrook/McEwing telephone conversation. According to Family, contrary to what the Initial Decision found, McEwing did not ask if Westbrook had any objection to Family specifying the site until after a number of other matters, including the need for Family to submit a formal written proposal, the rent for the site and the time frame of Family's application were discussed. Regardless of when Westbrook was asked if he had any objection, the fact remains that Westbrook did not inform McEwing at any time that he had no objection to Family's specifying the Mt Defiance site in its application. Family claims that when McEwing asked if Westbrook had any objection, Westbrook said only "send a letter." This, Family contends is "a significant change in both wording and formality from the 'formal written proposal' referred to at the beginning of the conversation and upon which the Judge focused in his Initial Decision." (Family's

[1] If the Presiding Judge made an error in this matter, it was in not accepting Bureau Exhibit 1. The Bureau considered Westbrook an important witness and requested that Family, which had the burden of proof in this proceeding, produce him for cross-examination. When Family refused to do so, the Bureau obtained a statement from Westbrook which it offered into evidence in lieu of his live testimony. Family's counsel admitted that if Westbrook were to appear that he would state that there is no basis whatsoever for Family's representation of reasonable assurance of site availability. (Tr. 11).

Exceptions, p. 7). McEwing's testimony, however, is that there was no difference between the letter Westbrook requested at the end of their conversation and the formal proposal he asked for at the beginning:

> Q [MR. ZAUNER] When he said send me a letter, was he talking about the proposal that he wanted from you or was this a different letter that he wanted?
>
> A. [MR. MCEWING] Thats what we had been discussing, was the formal proposal.

Tr. 44. Thus, there is no need to rely on Westbrook's version of events to conclude that there was no meeting of the minds concerning the availability of the Mt. Defiance site. McEwing's testimony indicates that he understood that a formal proposal was required. Such a proposal was never submitted.

7. "All that is ordinarily necessary for reasonable assurance is some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for the use of the property as a transmitter site, on terms to be negotiated, and that he would give notice of any change of intention." Elijah Broadcasting Corporation, 5 FCC Rcd 5350, 5351 (1990). It is clear that McEwing never received a "clear indication" from Westbrook that he was "amenable to entering into a future arrangement" with Family for use of the Mt. Defiance site.[2] Westbrook's failure to object to Family's specification

[2] After contacting Westbrook, but before Family's application was filed, McEwing received a letter from his communications counsel which stated, inter alia the following

of the site did not provide reasonable assurance.

8. Family claims that Westbrook's instruction to the engineer working at the Mt. Defiance site "to be as accommodating as possible" to Family's consulting engineer is evidence that Westbrook had given McEwing reasonable assurance that the site would be available. It is inconceivable, Family contends, that an engineer would be so instructed unless Westbrook had granted Family permission to file an application specifying the site. This is simply not so. Family's statements are apparently based on the written testimony of Gary Savoie. Fam Ex. 3. Savoie's conversations, however, were not with an employee of Westbrook. In fact, the record does not reveal to whom he spoke. It was apparently a "person on the WANC [a tenant on the Mt. Defiance tower] engineering staff," who told Savoie "something during the conversation which indicated that he was aware that Mr. McEwing had called about the site and that he had been instructed to be as accommodating as possible." Fam. Ex. 3, p. 3. This "evidence" was admitted into the record over the objection of the Bureau. Tr. 22-24. Significantly, the record does not reveal who told this person on WANC's engineering staff "to be as accommodating as possible." Thus, Family's claim "that Westbrook had

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concerning reasonable assurance:

> Reasonable assurance means, at a minimum, permission to use the site. The permission may be given orally--it need not be in writing--but it must be unambiguously given. Fam. Ex. 1, Tab B.

instructed his agent to be cooperative in providing the information necessary to the preparation of an application specifying the Mount Defiance site," has no support in the record.

9. Family cites National Innovative Programming Network, Inc of the East Coast, 2 FCC Rcd 5641 (1987), as a case where an applicant was found to have had reasonable assurance of the availability of its antenna site based on the response of a station manager that was "almost identical" to Westbrook's response to McEwing. In fact, the response was significantly different. In the National case, the station manager responded that he had no objection to the specification of his tower by the applicant, but that use was of the tower was conditioned upon Commission approval of a new location for his station's tower. Unlike the facts in National, Westbrook did not state that he had no objection to Family's proposal. His response was, send me a letter, by which it was understood he was referring to a formal proposal. Thus, Westbrook's response was entirely different than the response in the National case and that case is inapposite.

Where an applicant did not have reasonable assurance of the availability of its antenna site at the time it filed its application, it may not subsequently amend its application to specify a new site.

10. Family recognizes that Rem Malloy Broadcasting, 6 FCC Rcd 5843 (Rev. Bd. 1991) requires that where an applicant did not have reasonable assurance of its antenna site originally

specified in its application it cannot later amend its application to specify a new site. Family contends, however, that this general prohibition has to be read in light of the Review Board's holding in Port Huron Family Radio, Inc., 4 FCC Rcd 2532 (1989) review granted, modified on another issue, 5 FCC Rcd 4563 (1990), where it stated that "[a]n applicant seeking a new broadcast facility must, in good faith, possess 'reasonable assurance' of its transmitter site when it files its application." Family goes on to contend that a review of case law does not reveal a single case in which an applicant was denied the right to amend its application when it was the victim of a mistake or misunderstanding. Family further contends that in Georgia Public Telecommunications Commission, 7 FCC Rcd 2942 (1992), review den. 7 FCC Rcd 7996 (1992), the Review Board held that an applicant could not be disqualified under a false financial certification issue unless there was an intent to deceive the Commission. The Board then found the applicant qualified even though the applicant was financially unqualified at the time it filed its original financial certification. Family cites a number of other cases in which the Commission has permitted applicants to amend their applications where information in their applications proved to be incorrect based on a mistake or error.

11. In Rem Malloy the Commission, citing Genesee Communications Inc., 3 FCC Rcd 3595 (Rev. Bd. 1988), noted that

reasonable assurance requires at least a meeting of the minds resulting in some firm understanding as to the site's availability. Moreover, the Commission, citing Progressive Communications, Inc., 61 RR 2d 560, 562 (Rev. Bd, 1986), held that "'belief' simply will not alone suffice to establish 'reasonable assurance.'" In Rem Malloy, as in the instant case, no meeting of the minds ever occurred and no firm understanding was ever reached. McEwing's belief that he had reasonable assurance, like that of the applicant in Rem Malloy, is simply not sufficient to constitute reasonable assurance. In Rem Malloy the Commission went on to specifically hold that the applicant would not be permitted to amend to a new transmitter site where it did not have reasonable assurance at the outset. See also, National Communications Industries, 6 FCC Rcd 1978 (Rev. Bd. 1991), modified 7 FCC Rcd 1703 (1992), recon. den. subnom. Liberty Productions, A Limited Partnership, 7 FCC Rcd 7581 (1992). recon dismissed 8 FCC Rcd 4264 (1993), rev'd on other grounds, Biltmore Forest Broadcasting FM, Inc. v. FCC, No. 92-1645, D.C. Cir. March 15, 1994.

12. Family's reliance on the Georgia Public Telecommunications case is misplaced. In that case the Commission affirmed the Review Board, noting that all of the other parties had waived the right to challenge the applicant's initial financial qualifications. Moreover, the Commission noted that the applicant's failure to be financially qualified

initially was the result of it having been duped by individuals who had developed an elaborate scheme for defrauding investors. Because of these facts, the Commission made a limited exception to its general rule that a new financial proposal can be accepted only if the applicant had reasonable assurance of financing at the time of certification. 7 FCC Rcd at 7998-99. Suffice it to say, Family was not duped by individuals who had developed an elaborate scheme to deprive it of its antenna site.

13. Other cases cited by Family for the proposition that the Commission has permitted applicants to amend in similar situations can be easily distinguished. In Arizona Number One Radio, Inc., 103 FCC 2d 550 (Rev. Bd. (1986), applicants claimed to have reasonable assurance to use of land managed by the Bureau of Land Management. The Board held that their claim was not so speculative as to warrant a site availability issue in light of the fact that the Bureau only approves sites post FCC approval. Harrison County Broadcasting Co., 6 FCC Rcd 5819 (Rev. Bd. 1991), review denied, FCC 92-204, released May 12 1992), Brownfield Broadcasting Corp., 93 FCC 2d 1197 (Rev. Bd. 1993) and Family Broadcasting, Inc., 93 FCC 2d 771 (Rev. Bd. 1983), review denied FCC 83-559 (released November 29, 1983) are distinguisible in that in those cases the applicants did not seek to amend to change their antenna sites. Rather, their amendments were to correct the coordinates provided for their sites. In Tucson Community Broadcasting, Inc., 4 FCC Rcd 6316 (1989) no change in

site was required, only FAA clearance was needed. In each case, cited by Family the facts are significantly different from the facts in the instant case. Therefore, Family never had reasonable assurance and the Initial Decision properly rejected Family's amendment.

Conclusion

14. In sum, the Bureau submits that the Presiding Judge correctly decided this case and his Initial Decision should be affirmed for the reasons stated, supra.

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May 3, 1995

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau certifies that she has on this day of May 3, 1995, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Reply to Exceptions"** to:

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